



1 #11090851 for the discharge of dredged or fill material into waters of the United  
2 States. That Permit authorized the filling of wetlands to allow construction of a Costco  
3 store, fueling depot, and associated road and infrastructure located at 2404 South  
4 Lake Stevens Road in Lake Stevens, Snohomish County, Washington. That Permit  
5 authorized 1.72 acres of wetland to be directly filled, and another 1.39 acres to be  
6 effectively damaged and no longer fully functional as wetland due to lack of buffer  
7 space and altered hydrology.

8  
9 2.

10 Section 404 of the CWA requires that only those projects that represent the  
11 least damaging practicable alternative that will satisfy a project's purpose and need  
12 may be permitted. In determining the least damaging practicable alternative, the  
13 Corps must evaluate a number of environmental and economic factors pursuant to  
14 CWA regulations, must look at the entire project, and must consider the project in  
15 context with the cumulative effects from past wetland fills and likely future fills in the  
16 same Region.

17  
18 3.

19 The 404 Permit approved for this project is inappropriate and illegal for several  
20 reasons. The site was a highly productive forested wetland, and there are other sites  
21 nearby (some even on the same highway) that are practicable and less damaging to  
22 the environment. The evaluation of the site, its wildlife, and its wetlands was not  
23 credible, and falls short of what NEPA requires. Cumulative effects were not  
24 adequately analyzed, the geographical area of the cumulative effect analysis was  
25 inappropriate, and there was no consideration of the impacts of additional wetland fills

1 that are occurring, or will occur in the near future.

2                          4.

3                          The defendant's Public Interest analysis was also deficient, with both the  
4 evaluation of the site and the purported benefits to the public considered superficially,  
5 or not at all. The Corps failed to give weight to credible evidence it received from the  
6 public, and did not independently verify or corroborate evidence given it by the  
7 applicant.

8                          5.

9                          Alternative sites for the project were not adequately evaluated by the applicant,  
10 and the Corps failed to perform due diligence to confirm or refute the claims of the  
11 applicant about those other sites.  
12

13                          6.

14                          The EA and FONSI done for the Permit was not founded on adequate  
15 evidence, and do not reflect an independent evaluation by the Corps.

16                          7.

17                          The issuance of the Section 404 permit by the Corps, and the inadequate EA  
18 and FONSI, are final agency actions that are arbitrary, capricious, and otherwise not  
19 in accordance with law, and therefore are in violation of the Administrative Procedure  
20 Act, 5 U.S.C. § 706 et. seq. ("APA"). Livable Lake Stevens requests that this court  
21 grant injunctive and declaratory relief to compel the Corps to comply with its  
22 obligations under CWA and NEPA.

23                          ////

24                          ////

## **JURISDICTION AND VENUE**

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This action arises under the CWA, 33 U.S.C. § 1344, and NEPA, 42 U.S.C. §§ 4321-4347. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and may issue declaratory and further relief pursuant to 28 U.S.C. §§ 2201 and 2202. Plaintiff is entitled to bring this action pursuant to the APA, 5 U.S.C. §§ 701-06.

9.

Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

## PARTIES AND STANDING

**(Plaintiff)**

10-

Plaintiff Livable Lake Stevens ("LLS") a local coalition of individuals, businesses and others who are concerned about the potential effects of a Costco Warehouse on the proposed site. LLS has members who live, work and recreate on and near the wetland fill site in the city of Lake Stevens. Their activities and quality of life will be negatively impacted by the wetland fill and/or the construction of the proposed Costco.

11

LLS and its members have an interest in permitting agencies carrying out credible, verifiable studies and analyses to minimize harm to the environment. This interest is harmed by the flawed permitting and analysis by the Corps that led to the issuance of Permit #11090851

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12.

LLS and its members have commented to and corresponded with the Corps several times during the Corps' evaluation of this permit, as well as doing the same with the City of Lake Stevens and Snohomish County. LLS seeks to ensure that all applicable laws are followed in the decisions on this proposed project, and advocates for planning and policies that will have the least impact on environmental resources. These interests have been directly harmed by the violations of NEPA and the CWA by the defendants as described herein.

## **(Defendants)**

13.

The Corps is a Department of the U.S. Army. The Corps has responsibility for administering the CWA Section 404 program. The Corps issued the Section 404 permit and the EA that accompanied it.

14.

Colonel Alexander J. Bullock is the District Commander of the Corps' Seattle District, which has jurisdiction over the area in which the proposed project is located. Colonel Bullock was Commander on April 20, 2021 when Permit #11090851 was issued. Colonel Bullock is sued in his official capacity only.

## **LEGAL FRAMEWORK**

(CWA Section 404)

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CWA Section 404, found at 33 U.S.C. § 1344, prohibits the discharge of dredged or fill material into waters of the United States without a permit. The Corps is

1 the agency that implements the Section 404 program, under the oversight of the U.S.  
2 Environmental Protection Agency ("EPA").

16.

EPA established regulations pursuant to CWA Section 404 that govern Corps permitting decisions. These are known as the 404(b)(1) guidelines and found at 40 C.F.R. Part 230. One provision of these Rules, 40 C.F.R. § 230.10(a), prohibits issuance of a permit if there is a practicable alternative which would have less impact on the aquatic ecosystem.

17

Practicable alternatives are those which are available and can be accomplished after taking into account costs, technology, and logistics in light of overall project purposes. Alternative sites and ways of accomplishing the project with less or no impact on special aquatic sites are presumed to be available, unless the applicant clearly demonstrates otherwise.

18

Pursuant to its own regulations, found at 33 C.F.R. § 320.4, the Corps must also complete a public interest review when evaluating Section 404 permit applications. As part of that review, the Corps must evaluate "the probable impacts, including cumulative impacts, of a proposed activity and its intended use on the public interest." That is required by 33 C.F.R. § 320.4(a)(1). The factors considered in a public interest review include both environmental and economic impacts. The Corps must start with and apply the presumption that the destruction of wetlands is contrary to the public interest, as that is the mandate of 33 U.S.C. § 320.4(b)(1).

(NEPA)

19.

Pursuant to 42 U.S.C. § 4332(2)(C) NEPA requires agencies to prepare an Environmental Impact Statement ("EIS") before undertaking a major federal action that will significantly affect the quality of the human environment. The issuance of a Section 404 CWA wetland fill permit is potentially such a federal action, and triggers NEPA.

20.

The "human environment" that is potentially affected is defined in current Council on Environmental Quality ("CEQ") regulations found at 40 C.F.R. § 1508.1(m) to be "...comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment."<sup>1</sup> The wetlands at issue in this case, and the fish and wildlife that rely on them, are part of that same human environment.

21.

The preparation of an EIS serves three primary functions. First, it ensures that an agency takes a hard look at the direct, indirect and cumulative environmental impacts of a proposed project before proceeding. Second, it guarantees that the agency considers a range of reasonable alternatives to accomplish the underlying

<sup>1</sup> The CEQ revised the Regulations implementing NEPA in July 2020, during the Trump Administration. There were significant changes made to the Regulations at that time. Those revisions have been challenged in a number of lawsuits. There is a distinct possibility that the current version of the Regulations will be overturned. The Biden Administration has also already published notice of its intent to amend the Regulations, to return to the prior version of the CEQ Regulations - on the grounds that the prior Regulations more accurately state the law that agencies must apply when implementing NEPA.

1 goals of the proposed project and considers options that may have fewer adverse  
2 impacts on the environment before deciding whether to undertake the project in the  
3 form proposed. Finally, the EIS provides the public and other agencies with detailed  
4 information about a proposed project, its impacts, and reasonable alternatives, so that  
5 they may participate meaningfully in the decision-making process.  
6

7 22.

8 In the NEPA process, first, an agency conducts an Environmental Assessment  
9 ("EA") to decide if there are significant environmental impacts. If such impacts are  
10 found, an EIS is undertaken. If, after conducting the EA, the agency decides that the  
11 impacts do not rise to the level of significance, a Finding of no Significant Impact  
12 ("FONSI") is published giving the reasons for the agency conclusion. Under Corps  
13 regulations, specifically 33 CFR § 230.10(a) & (b) the District Commander is  
14 responsible for making the determination and informing the public of the availability of  
15 the EA and the FONSI.  
16

17 23.

18 The basic purpose of NEPA is to ensure that Federal agencies conduct  
19 environmental reviews in a coordinated, consistent, predictable and timely manner.  
20 NEPA, specifically 42 U.S.C. § 4332(2)(C) & (E), requires that every EIS must  
21 discuss, among other things, the adverse environmental effects of the proposed  
22 action and the alternatives to the proposed action which may avoid or minimize these  
23 adverse effects.  
24

25 24.

26 The "effects" that must be discussed in an EIS include, among other

1 considerations, the direct environmental impacts of the proposed action, the indirect  
2 effects of the proposed action, and the cumulative impacts of the proposed action.  
3 Direct impacts are those caused by the action and occurring at the same time and  
4 place.

5 25.

6  
7 Indirect effects are those effects which are caused by the action and are later  
8 in time or farther removed in distance, but are still reasonably foreseeable. Indirect  
9 effects may include "growth inducing effects and other effects related to induced  
10 changes in the pattern of land use, population density or growth rate, and related  
11 effects on air and water and other natural systems, including ecosystems.

12 26.

13  
14 A cumulative impact is an impact on the environment which results from the  
15 incremental impact of the action when added to other past, present, and reasonably  
16 foreseeable future actions regardless of what agency or person undertakes such  
17 other actions. Cumulative impacts can result from individually minor but collectively  
18 significant actions taking place over a period of time.

19 (The APA)

20 27.

21  
22 The APA, provides anyone aggrieved or adversely affected by agency action  
23 the right to judicial review.

24 28.

25  
26 The APA further provides that a reviewing court "shall" hold unlawful and set  
aside agency action, findings, and conclusions found to be "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law" including findings that are not supported by substantial evidence.

29.

The Corps' issuance of the challenged CWA Section 404 Permit, along with its EA and FONSI, are subject to judicial review under the APA.

## **FACTUAL BACKGROUND**

30.

The application for the challenged Permit was received by the Corps in February 2019. The application requested permission to fill several wetland areas on properties presently owned by the City of Lake Stevens, and a private owner.

31.

Public Notice of the application was given by the Corps and a public comment period was announced in March 2020. LLS submitted comments on the application in April 2020.

32

LLS' comments noted the lack of detail in the applicant's description of the flora, fauna, and ecological functions of the project site, and the absence of any draft environmental impact analysis. LLS pointed out that other than determinations on listed species, the material submitted lacked evidence of a good-faith effort to document the impacts of the development on the many species of plants, fish and wildlife that presently occupy the site. Without such baseline data, the environmental impacts of the project cannot be reliably quantified.

|||||

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33.

LLS' comments also pointed out the lack of evidence of public benefits that would allegedly accrue from the project, in an area that already boasts several Costco stores, and the absence of any accounting for the loss of benefits now provided by the forested wetland site and its abundant wildlife. In addition, LLS pointed out the superficial and misleading nature of the alternatives analysis of other potential store sites, and the practicable suitability of siting such a store at other sites that would have less impact on high-functioning wetlands than the proposed site.

34

LLS also noted the nearly 200 wetland fill permits issued by the Corps in Snohomish County since 2004, the other wetland fills already slated for the near future, and the lack of any cumulative effects analysis that accounted for the impacts of those fills and the cumulative effects of the proposed fill under this Permit when viewed in conjunction with past, present and reasonably foreseeable future wetland fills

35

In October 2020 LLS submitted a supplemental comment to the Corps, describing additional and continuing inconsistencies or issues with the applicant's alternatives analysis. The supplemental comment also requested that the Corps do independent evaluation and verification of the environmental impacts on the site for NEPA compliance, since the site still had not been documented for its wildlife hydrologic functions, and other ecological values by the applicant.

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36.

In November 2020 LLS submitted yet another supplemental comment on the additional cumulative impact from a Washington State Department of Transportation wetland fill applications for adjacent wetlands. LLS pointed that to date those impacts have not been evaluated or considered by either the applicant or the Corps, and that to do an adequate cumulative impact analysis such an analysis would be necessary.

37.

Although the applicant did submit additional information to the Corps on various aspects of the application, the legal and factual issues raised by LLS in its comments have not been resolved.

## **FIRST CLAIM FOR RELIEF**

# **(Violations of CWA Due to Deficient Public Interest Review, Inadequate Cumulative Impacts Analysis, and Inadequate Alternatives Analysis)**

38.

The above paragraphs, #1 - 37, are incorporated herein by reference.

39

The Corps violated CWA Section 404 in several ways. Defendants improperly relied on incomplete and unverified data and statements by the applicant in claims of benefits to the public, and failed to quantify and analyze benefits to the public from the site as it is presently.

40

Cumulative effects were not quantified or considered adequately. The

1 geographical scope was improperly narrow, no accounting of the cumulative impacts  
2 of past or reasonably foreseeable future wetland impacts was made, and the findings  
3 on cumulative impacts were not based on evidence and a reasoned process, but were  
4 merely conclusory.  
5

6 41.

7 Practicable alternatives to the preferred site were improperly rejected based on  
8 unsupported assumptions, unverified information, and incomplete analysis. The  
9 conclusion that the preferred alternative is the least environmentally damaging  
10 practicable alternative is inaccurate and arbitrary and capricious.

11 42.

12 Defendants' inadequate process in carrying out CWA Section 404, and  
13 defendant's issuance of this permit were arbitrary, capricious and otherwise not in  
14 accordance with the law, and as such violate the APA.  
15

16 43.

17 Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, plaintiff should  
18 be awarded its costs, expenses, expert witness fees, and reasonable attorney fees  
19 associated with this litigation.  
20

## 21                   **SECOND CLAIM FOR RELIEF**

### 22                   **(The Corps' EA and FONSI Violate NEPA)**

23 44.

24 Paragraphs 1 - 37 and 43 are realleged.  
25

26 45.

NEPA requires a hard look at the project's direct, indirect and cumulative

1 effects.

2 46.

3 The Corps' EA and FONSI are not supported by substantial (or any) evidence  
4 that demonstrates the thorough and proper examination of direct, indirect, and  
5 cumulative effects of the project that the law requires.  
6

7 47.

8 The Corps failure to independently verify the studies and impacts to the human  
9 environment, means that the findings in its EA and FONSI are based on an  
10 incomplete and inadequate analysis.

11 48.

12 Defendants' EA and FONSI are arbitrary, capricious, and otherwise not in  
13 accordance with the law.  
14

15 49.

16 Defendants' inadequate process in carrying out NEPA and defendant's  
17 issuance of this permit with only an EA/FONSI were arbitrary, capricious and  
18 otherwise not in accordance with the law, and as such violate the APA.  
19

### **REQUEST FOR RELIEF**

20 WHEREFORE, Plaintiff respectfully requests that this court:  
21

- 22 1. Enter a Declaratory Judgment that defendants have violated the National  
23 Environmental Policy Act by preparing a deficient Environmental Assessment and  
24 Finding of No Significant Impact for this proposed project.
- 25 2. Enter a Declaratory Judgment that defendants have violated the Clean  
26 Water Act Section 404 by issuing a permit to the proposed project.

1           3. Enter a Declaratory Judgment that defendants have violated the  
2 Administrative Procedure Act by issuing a permit to the proposed project using a  
3 process that did not comply with either NEPA or the CWA or both.

4           4. Vacate the permit issued April 20, 2021, authorizing fill of wetlands at this  
5 site.

6           5. Enter injunctive relief to ensure that defendants in the future comply with  
7 the Clean Water Act and/or the National Environmental Policy Act, when issuing  
8 similar permits.

9  
10          6. Award Plaintiff the costs and reasonable attorney fees.

11          7. Grant such other relief as the court deems equitable and proper.

12          Dated this \_\_\_\_\_ day of October, 2021.  
13

14          By: \_\_\_\_\_  
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16                   kga@integra.net  
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